Supreme Court, U.S.
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No. 03-277 (3)

Supreme Court of the United States

Benoit Brookens,
Petitioner

v.

Federal Labor Relations Authority
Respondent

On Petition for Writ of Certiorari
To The District of Columbia Court of Appeals

Petitioner's Reply Brief

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6 pp

The FLRA Mis-stated the Terms of the Award and Redefined the Problem

The FLRA has (1) factually mis-stated the plain language of the Arbitrator's award and (2) redefined the problem—its failure under the Federal Labor-Management Relations statute, 5 U.S.C. 7122(b), to require the Labor Department to comply with the terms of the arbitration award.

(A) **The FLRA Mis-Read the Remedy Ordered by the Arbitrator**

The Arbitration award in United Stated Department of Labor and American Federation of Government Employees, Local 12, ARB-00-07 rendered by impartial arbitrator Suzanne Butler on December 7, 2000 and sought to be enforced by the employees provides the following:

AWARD

I. The twenty (20) day suspension of the Grievant was not for such cause as would promote the efficiency of the Service. As remedy, the twenty (20) day suspension shall be rescinded and expunged from the Grievant's record. The Grievant shall be made whole, including interest, for the difference between what he earned and what he would have earned, but for the violation of the Agreement found in this matter.

(B) The General Counsel's Conduct is an Abdication of its Statutory Duties

Both the FLRA, in its Opposition (p. 8 footnote 2), and the Employee, in his U.S. Court of Appeals Brief for Rehearing and or Rehearing in Banc (p.2) recognize that agency conduct "so extreme as to amount to an abdication of its statutory responsibilities" (quoting Hechler, 470 U.S. at 833 n. 3) would be judicially reviewable.

The FLRA contends "[t]o the extent that the Ninth Circuit's decision in Montana Air created a intra-circuit conflict, it is not a basis for an exercise of this Court's certiorari jurisdiction." However the employee sees Montana Air, from the 9th Circuit, and Department of Navy v. FLRA 815 F. 2d 797 (1st Cir. 1987), from the First Circuit, both operating to create inter-circuit conflicts concerning the very type of alleged arbitrary agency action judicial review contemplated in Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 413-16, 91 S. Ct. 814, 822-23, 28 L.Ed.2d 136 (1970) sought to curtail. If any intra-circuit conflicts exist, it is within the D.C. Circuit.

The General Counsel, in its opposition, overlooked its statutory responsibility for the enforcement of 5 U.S.C. 7116(a)(1) and (8). As summarized in Walsh v. United States, 588 F. Supp. 523, at 527 (1983), provides that "Art. 7116(a)(8), which makes it an unfair labor practice 'to otherwise fail or refuse to comply with any provision of this chapter'"—included agency compliance with final arbitration awards.

The General Counsel, in its decision, failed to properly interpret 5 U.S.C. 7116(a)(1) and (8) and 7122(b) when it

failed to deny the Labor Department an indirect review of the arbitrator's Award.

> In our view, the purposes and policies of the Statute identified and discussed by the Authority and the courts in denying indirect review of the merits of an arbitration award in an unfair labor practice proceeding for refusing to comply with the award are best served in this case by enforcing the madate of section 7122(b): the [SSA] shall take the actions required by the Arbitrator's final award...[T]the [ALJ's opposite] approach has nothing to commend it in terms of the Statute's strong endorsement of arbitration as the preferred means of resolving labor disputes with dispatch and finality. SSA III, 41 F.L.R.A. at 768. Department of Health and Human Services v. FLRA, 976 F.2d 1409, 1413, (D.C. Cir. 1992)

In American Federation of Government Employees, AFL-CIO, Local 3090 v. FLRA 777 F.2d 751 (D.C. Cir 1985) the General Counsel took the necessary action to force agency compliance with the arbitration award. That decision provides the following:

> We agree with the petitioner that, absent a stay, the agency was obligated to comply with the arbitration decision, and that the dismissal of the unfair labor practice complaint was improper.

Although the agency, in AFGE Local 3090, eventually complied with the arbitration award, the institution of the unfair labor practice complaint by the FLRA General Counsel also had available additional sanctions that could be imposed on the agency for its failure to comply with the arbitration award as required by the statute.

Federal employees do not have recourse to U.S. District Courts as is available to employees in the private sector to enforce arbitration awards. For Federal employees, the power to enforce favorable employee arbitration awards lies exclusively within the domain of the FLRA General Counsel.

In this proceeding, if the ULP charges were not related to "enforcement of an arbitration award," perhaps the General Counsel's failure to prosecute would be "discretionary." However, as the sole enforcement arm for the federal employee arbitration enforcement system, the FLRA's General Counsel actions are ministerial—and it is bound by statute to perform them.

Had Congress intended for the enforcement of arbitration awards to be within the discretion of the FLRA General Counsel, Congress would not have included sections 5 U.S.C. 7116(a)(1) and (8) to encompass agency failure to comply with arbitration awards as"unfair labor practices" nor would it have included 5 U.S.C. 7122(b) to require agencies to "take the action required by an arbitrator's final award." Finally, if Congress wanted FLRA arbitration awards to be discretionary, Congress, when it enacted the FLRA statute, would have copied the NLRB enforcement mode in its entirety and provided arbitration award enforcement authority in U.S. District Courts.

For these reasons, the Employee prays that this petition is granted.

Respectfully submitted this 3rd day of November October 2003.

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